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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/981,015	10/17/2001	Steve Dispensa	1573	5595
28004	7590	02/15/2006	EXAMINER	
SPRINT 6391 SPRINT PARKWAY KSOPHT0101-Z2100 OVERLAND PARK, KS 66251-2100				APPIAH, CHARLES NANA
			ART UNIT	PAPER NUMBER
			2686	

DATE MAILED: 02/15/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	09/981,015	DISPENSA ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Charles N. Appiah	2686	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 28 February 2005.  
 2a) This action is FINAL.                            2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1-60 is/are pending in the application.  
 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
 5) Claim(s) \_\_\_\_\_ is/are allowed.  
 6) Claim(s) 1-60 is/are rejected.  
 7) Claim(s) \_\_\_\_\_ is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) Notice of References Cited (PTO-892)  
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)  
 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
 Paper No(s)/Mail Date \_\_\_\_\_

4) Interview Summary (PTO-413)  
 Paper No(s)/Mail Date. \_\_\_\_\_.  
 5) Notice of Informal Patent Application (PTO-152)  
 6) Other: \_\_\_\_\_.

## DETAILED ACTION

**This Action is in response to the re-submitted Response filed on February 28, 2005. Note that examiner Charles Appiah has taken over the processing of this application.**

### ***Double Patenting***

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 1-60 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-54 of U.S. Patent No. 09/981,172 ('271 application). Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of the instant application are broad enough to be encompassed by the limitations of the '271 application and as such it would have been obvious to one of ordinary skill in the art to implement the invention of the instant

application using the claims of the '271 application in order to monitor the performance of the communication system.

***Claim Rejections - 35 USC § 103***

3. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
4. Claims 1-60 are rejected under 35 U.S.C. 103(a) as being unpatentable over Moura et al. (6,411,606) in view of Kleider (6,154,489).

Regarding claims 1, 21 and 41 Moura teaches a method and software product for operating a probe device and probe device in a broadband wireless system, the method comprising: receiving a message (issuing a connection request to data server from client application, see col. 8, lines 24-30, col. 9, lines 36-65 as well as reception of heartbeat messages from the client at selected time intervals see col. 10, lines, 10-13), processing the message to determine channel information that indicates performance of channels in the broadband wireless system (server software monitoring other channel quality parameters including errors and signal to noise ratios, see col. 10, lines 13-19). Moura fails to explicitly disclose storing channel information in a memory in the probe device.

In an analogous field of endeavor, Kleider discloses a method for processing and storing channel status and performance information (see col. 7, lines 35-50).

It would therefore have been obvious to one of ordinary skill in the art to modify Moura with Kleider's channel status estimator in order to ensure the capability to use stored performance data to make communication resource allocation.

Regarding claims 2, 22 and 42 Moura further discloses wherein the channels are upstream (see col. 5, lines 43-49).

Regarding claims 3, 23 and 43 Moura further discloses wherein the channels are downstream (see col. 5, lines 43-48).

Regarding claims 4, 24 and 44 Moura further discloses wherein the message is a credit that allows usage of one of the channels (see col. 14, lines 43-51).

Regarding claims 5, 25 and 45 Moura further discloses wherein the message indicates a completion of usage one of the channels (see col. 2, lines 61-64, col. 15, lines 59-62).

Regarding claims 6, 26 and 46 Moura further discloses wherein the probe device is connected to a switch in the broadband wireless system (see Fig. 2A, col. 6, lines 35-61).

Regarding claims 7, 27 and 47 Moura further discloses wherein the probe is connected to an upstream manager in the broadband wireless system (see network management system 37, Fig. 2A, col. 6, lines 35-43).

Regarding claims 8, 28 and 48 Moura further discloses wherein the probe device is connected to a downstream manager in the broadband wireless system (see network management system 37, Fig. 2A, col. 6, lines 35-43).

Regarding claims 9, 29 and 49 Moura further discloses wherein processing the message comprises determining a state of one of the channels, see col. 2, lines 38-60).

Regarding claims 10, 30 and 50 Moura further discloses wherein the state is polling (see col. 2, lines 50-67).

Regarding claims 11, 31 and 51 Moura further discloses wherein the state is dedicated (see col. 5, lines 15-24, col. 5, lines 34-59).

Regarding claims 12, 32 and 52 Moura further discloses wherein the state is idle (see col. 2, lines 58-60).

Regarding claims 13, 33 and 53 Moura further discloses determining a time in the state (see col. 2, lines 61-64).

Regarding claims 14, 34 and 54 Moura further discloses wherein processing the message comprises monitoring a number of bytes transmitted (see col. 2, lines 16-38).

Regarding claims 15, 35 and 55 Moura further discloses wherein processing the message comprises monitoring a number of messages transmitted during a state of one of the channels (see col. 2, lines 16-24).

Regarding claims 16, 36 and 56 Moura further discloses wherein the channel information comprises a state of one of the channels (see col. 2, lines 38-60).

Regarding claims 17, 37 and 57 Moura further discloses wherein the channel information comprises a change in a state of one of the channels (see col. 2, lines 58-64).

Regarding claims 18, 38 and 58 Moura further discloses wherein the channel information comprises a number of bytes transmitted (see col. 2, lines 16-38).

Regarding claims 19, 39 and 59 Moura further discloses wherein the channel information comprises a number of messages transmitted (see col. 2, lines 16-27).

Regarding claims 20, 40 and 60 Moura further discloses wherein the channel information comprises a number of messages transmitted (see col. 2, lines 58-61).

### ***Response to Arguments***

5. Applicant's arguments with respect to claims 1-60 have been considered but are moot in view of the new ground(s) of rejection.

In response to applicant's argument that Moura doesn't talk about "receiving a message" and then "processing the message to determine channel information...." Examiner maintains that the cited portions of Moura as set forth in the rejection meet the claimed limitations.

### ***Conclusion***

6. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Schneider (6,377,562) discloses a wireless asymmetric broadband data delivery system.

Varma et al. (6,275,497) discloses a method for channel control using contention and polling schemes.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to **Charles N. Appiah whose telephone number is 571 272-7904**. The examiner can normally be reached on M-F 7:30AM-5:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, **Marsha Banks-Harold can be reached on 571 272-7905**. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

CA



CHARLES APPIAH  
PRIMARY EXAMINER